UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CRISTAL USA, INC. and INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,	Case No. 08-CA-08-CA-200330

CHARGING PARTY UNION'S MEMORANDUM IN OPPOSITION TO RESPONDENT CRISTAL USA, INC.'S MOTION FOR SUMMARY JUDGMENT (Plant 2 North Unit) WITH SUPPORTING MEMORANDUM

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Now come the Charging Party, the International Chemical Workers Union Council/UFCW (Union), and hereby files this Memorandum opposing Respondent Cristal USA, Inc.'s summary judgment motion for the reasons set forth below. Cristal's motion is based almost entirely on its position that this Board should effectively re-open the *closed* RC case in ***Cristal USA, Inc***., 08-RC-184947, vacate the Certification of Representative for Cristal's Plant 2 North unit, dismiss the related Petition filed by the Union and, correspondingly, dismiss the Complaint in this case. Cristal's position is based entirely on the Board's recent decision in ***PCC Structurals, Inc***., 365 NLRB No. 160 (Dec. 15, 2017).

For the reasons stated herein, the Board should dismiss Cristal's motion, *see, e.g.*, NLRB Rule 102.67(g), and grant the summary judgment motions currently pending of Counsel for the General Counsel and the Union.

I. STATEMENT OF THE CASE[1/]

Despite Cristal's nomenclature referring to its three plants as Plant 1 and Plant 2, suggesting that there are only two (2) separate plants, Cristal actually operates three (3) separate plants in close proximity to each other in Ashtabula County, Ohio: Plant 1, whose production and maintenance employees are represented by Local 7334 of the Steelworkers; Plant 2 South, whose employees are unrepresented; and Plant 2 North, where the Union was certified as the exclusive representative of a unit of all full-time and regular part-time time production employee.

On September 26, 2016, the Union filed a representation petition seeking to represent a unit of production employees at Cristal's Ashtabula, Ohio, Plant 2 North facility in the underlying RC case, ***Cristal USA, Inc***., Case 08-RC-184947. Subsequently, Cristal filed its Statement of Position

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[1/]Throughout its Memorandum supporting its summary judgment motion, Cristal makes a number of factual assertions that it did not adequately support in its Request for Review in the underlying RC case (RFR), ***Cristal USA, Inc***., Case 08-RC-184947. In the "Union's Response to Cristal USA, Inc.'s Request for Review of Regional Director's Decision and Direction of Election" at p. 3 in Case 08-RC-184947 ("Union Response"), the Union contended that the Board should disregard any factual assertions by Cristal, unless they were supported by the Regional Director's findings in his Decision and Direction of Election (DDE), or by the four (4) exhibits attached to Cristal's RFR. Otherwise, Cristal's factual assertions should be disregarded, based on the "self-contained" document requirements of NLRB Rule 102.67(e). The Union maintains that position here.

Eventually, Cristal realized it had not properly and adequately supported its RFR with attached selections from the Record and, subsequently, attempted to cure its error by seeking consolidation of Case 08-RC-184947 with Case 08-RC-188482, and, later, consolidation of the pending unfair labor practice charges in Cases 08-CA-200330 and 08-CA-200737, apparently so it also could rely on the documents it attached to its RFR in Case 08-RC-18842. The Union has opposed those efforts as untimely and a misuse of the consolidation process.

Nevertheless, regardless of consolidation, it would be a misuse of the consolidation rules to allow Cristal to retroactively and effectively supplement its RFR record. Thus, even if the Board should consolidate these unfair labor practice cases, it should only rely upon the actual documents supplied by Cristal with its RFR in the underlying RC case in Case 08-RC-184947.

(SOP). A careful reading of that SOP establishes that Cristal primarily challenged the proposed unit as not meeting the ***Specialty Healthcare*** guidelines, arguing that the excluded and included employees have an "overwhelming" community-of-interest with each, or that the proposed unit was a "fractured" unit violating Section 9(c)(5) of the Act, rather than seeking the wholesale reversal of the ***Specialty Healthcare*** analytical framework. Cristal argued that only a unit of all of its production, maintenance, and warehouse employees at its Plant 2 South building – which is a half-mile on the other side of a public road away from its Plant 2 North building – and at its Plant 2 North operations would be appropriate. For the most part, however, Cristal's SOP challenge was to the Union's proposed unit based on the application of ***Specialty Healthcare***, not based on a challenge to ***Specialty Healthcare*** itself.

For instance, Cristal challenged the petitioned-for unit, itself, as violating Section 9(c)(5) of the Act, not ***Specialty Healthcare's*** guidelines for determining the appropriateness of a unit as violating that provision of the Act. At most, Cristal may have preserved the issue that ***Specialty Healthcare***, at least as applied by the Union to the petitioned-for unit, may have violated the "in each case" requirements of Section 9(b) of the Act. However, given that the RD had carefully considered the matter, that argument would appear to have little weight, particularly given prior Supreme Court decisions.[2/]

On November 3, 2016, the RD issued his decision and direction of election (DDE). On November 25, 2016, following the Union's success in the representation election, the RD issued his certification of representative. Thereafter, Crystal filed its request for review (RFR) of that DDE with

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[2/] A similar argument to Cristal's "in each case" argument, however, has been rejected by the United States Supreme Court. *See*, ***American Hosp. Association***, *infra*.

the Board. Despite the NLRB Rule 102.67(e) "self-contained" document requirements, Cristal attached only four (4) documents to its RFR, none containing any substantive testimony from the RC hearing. Consequently, most of its factual contentions in its RFR could not be verified from the "self-contained" document. Consequently, among other things, the Union in the "Union's Response to Cristal USA, Inc.'s Request for Review of Regional Director's Decision and Direction of Election" (Union Response) at p. 3, objected to the Board considering any of Cristal's allegedly "facts," or its references to the prior hearing transcript, or other purported evidence, unless they were supported by the "self-contained" RFR.

On May 18, 2017, the Board in a 2-1 decision, denied Cristal's request for review, setting forth in n. 1 its basis for finding that the petitioned-for unit constitutes an appropriate unit. ***Cristal USA, Inc***., 365 NLRB No. 82 (2017). Subsequently, the Board denied Cristal's motion for reconsideration of that decision.

Similarly, the Union filed a petition in ***Cristal USA, Inc***., Case 08-RC-188482, seeking to represent a warehouse unit at Cristal's Ashtabula, Ohio, operations. Following the RD's approval of that proposed unit and the Union's representation election success, Cristal similarly filed at RFR with the Board. Again, the Board denied that request. ***Cristal USA, Inc***., 365 NLRB No. 74 (2017). Cristal's motion for reconsideration similarly was denied.

Consequently, the Board four (4) times has had an opportunity to agree with Cristal -- that the only appropriate unit would be all of the production, maintenance, and warehouse employees at both the North and South Plant 2 operations – but rejected Cristal's arguments.

Subsequently, when the Union sought to bargain, as the certified representative, separately for both the plant and warehouse units, requesting certain information it believed necessary to

prepare for such bargaining, Cristal refused, as a "test of cert," resulting in the filing of the instant Charge and Complaint.

Both the Union and Counsel for the General Counsel have pending motions for summary judgment. Recently, Cristal, which does not deny that it has refused to recognize and bargain with the Union, or provide the requested information, filed its own summary judgment motion. That motion relies almost solely on its previously-rejected (4 times) position that the RD's approved units are not appropriate and that the prior certifications of representative should be re-opened and vacated based on a change in Board law, a change that, unlike ***Specialty Healthcare***, has not been approved by *any* court of appeals.

II. ARGUMENT

A. Cristal's motion for summary judgment should be denied for the same reasons that Counsel for General Counsel's and/or the Union's pending summary judgment motions should be granted.

In support of its motion, the Union incorporates by reference and relies herein on its and the Counsel for General Counsel's memoranda supporting her earlier-filed, pending motion for summary judgment in this case, as well as on the Union's earlier-filed memorandum supporting its own pending summary judgment motion in this case, both of which it incorporates by reference.

B. ***PCC Structurals***, the case primarily relied on by Cristal, should either be vacated, or overturned, and, therefore, not applied to this case.[3/]

While Cristal primarily relies on this Board's recent decision in ***PCC Structurals*** to support its efforts to have the Complaint dismissed, the related, underlying RC case effectively reopened,

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[3/] Unlike in ***PCC Structurals, Inc.***, 365 NLRB No. 160 (2017), an RC case in which that union had no realistic, or practical, means by which to appeal the Board's decision to court, the Union, here, in this CA case does have such an avenue for appeal.

the Regional Director's DDE vacated, and the Union's Certificate of Representative vacated, the Union submits that it would be improper, inconsistent with the purposes of the Act, and/or not advisable for the Board to apply ***PCC Structurals*** in this case for a number of reasons.

The Union continues to rely on its motions for recusal filed earlier in this matter and incorporates by reference its memoranda (with attachments thereto) supporting those pending recusal motions**.** It emphasizes that Member Emanuel also should have recused himself from participation in ***PCC Structurals,*** *supra*, since he was on the amicus brief in the Sixth Circuit in ***Kindred Nursing Centers East, LLC v. NLRB***, 727 F.3d 552 (6th Cir. 2013), *enf'ing sub. nom*, ***Specialty Healthcare and Rehab. Ctr. of Mobile***, 357 NLRB No. 83 (2011). In that amicus brief, now-Member Emanuel and his then-law firm sought the reversal of ***Specialty Healthcare*** based on many of the same arguments relied on by the majority in ***PCC Structurals***. Just as he should recuse himself from this case, given his prior firm's continued representation of Respondent Cristal, he also should have recused himself in ***PCC Structurals*** in which his vote created the majority sufficient to overturn ***Specialty Healthcare***. Most disinterested observers would, or should, come to the same conclusion:

> "The test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.' Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), cert. denied, 361 U.S. 896, 80 S.Ct. 200, 4 L.Ed.2d 152 (1959)."

Cinderella Career & Finishing Schools, Inc. v. F.T.C., 425 F.2d 583, 591 (D.C.Cir. 1970).

By participating in ***PCC Structurals***, Member Emanuel was seeking to, and did, obtain, as a Board member, that which he was unable to obtain as a member of the Littler firm, *i.e.*, the reversal of ***Specialty Healthcare***. Member Emanuel's participation on an amicus brief, seeking to overturn

Specialty Healthcare, only more strongly suggests an "appearance" that he had pre-judged this legal issue, whether he actually had. If he had been representing Specialty Healthcare, now known as Kindred Nursing Center on appeal, both before the Board and, then, on appeal, one might grant him the benefit of the doubt and assume that he was just representing the best interest of his client, an actual party to the proceeding. But he apparently had not been representing Specialty Healthcare at any level. Thus, there was no requirement that he continue to represent a client and, thus, advocate for overruling ***Specialty Healthcare***, when he participated *on an amicus brief on appeal* in *Kindred*. His participation, then, on behalf of an amicus, only strengthens the apparent "appearance" that, by advocating for ***Specialty Healthcare*** to be overturned, he personally had prejudged the legal issue. At least a "disinterested observer" could conclude that, "in some measure [he had pre] adjudged ... the law of a particular case in advance of hearing." ***Cinderella Career***, *supra*. The rapidity with which he chose to vote to overturn ***Specialty Healthcare*** shortly after assuming his membership on the Board only reinforces that "appearance."

The actions by the majority in ***PCC Structurals*** -- a majority only with Member Emanuel's vote -- only emphasizes this point. Despite the Petitioner in ***PCC Structurals*** having argued that ***PCC Structurals*** had waived its right to even seek the overturning of ***Specialty Healthcare***, *see*, "Opposition to Request for Review" at p. 2 in Case 19-RC-202188 (10/902017), as per NLRB Rule 102.66(d), one must search the majority's opinion to see whether they ever acknowledged, let alone decided, that waiver issue. Given the rapidity with which the Board reached its decision to overturn precedent upheld by eight (8) circuit courts, the reasons more fully explained by the dissent in ***PCC structurals***, and Member Emanuel's participation on the amicus brief in ***Kindred Nursing Center***, there arguably is an "appearance," at least, that there were not deliberative minds at work, as opposed

to a mind already made up. At least, that is likely what many disinterested observers would or could find, *i.e.*, that he should have recused himself in ***PCC Structurals***.

Member Emanuel's participation, as a Board member in ***PCC Structurals***, in the reversal of ***Specialty Healthcare*** – despite he and his firm having unsuccessfully sought, as an amicus, reversal of ***Specialty Healthcare*** in the 6th Circuit – also raises at a minimum an "appearance" of a conflict of interest and/or an "appearance" of bias. As such, just as in ***Hy-Brand***, *supra*, Member Emanuel should not have participated in the ***PCC Structurals***, and he should not participate in this case.

His participation, then, under such circumstances requires a vacating,[4/] or reversal, of ***PCC Structurals***, unless that decision is not applied here, as it should not be, as argued below. Consequently, for the reasons stated herein and in its pending recusal motion, the Board should not apply ***PCC Structurals*** to this case. *See*, ***Hy-Brand Industrial Contractors***, 366 NLRB No. 26 (2018).

C. Regardless of the recusal motions, the ***PCC Structurals*** decision should not be applied to this case.

The Union submits that ***PCC Structurals*** is not applicable here and should not be applied, retroactively, *or otherwise*, to this case. As explained above, if Member Emanuel had recused himself from ***PCC Structurals***, as the Union submits he should have, the decision in that case likely would have been 2-2 and, therefore, non-precedential. ***Specialty Healthcare*** would still be applicable.

More importantly, the underlying RC case in this matter, ***Cristal USA, Inc***, 365 NLRB No. 82 (2017), may not, and should not, be re-litigated in this CA case. *See*, NLRB Rule 102.67(g).

[4/] ***PCC Structurals*** also should be reversed for the reasons stated by the dissenting opinion in that case and as violating the First Amendment, as discussed below.

NLRB Rule 102.67(g) provides:

> "(g) *Finality; waiver; denial of request.* **The Regional Director's actions are final unless a request for review is granted.** The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

(bold underlining added). Other than the Board's decision, itself, in ***PCC Structurals***, all of the issues raised by Cristal in its motion were, or could have been, raised in its request for review and in its subsequent motion for reconsideration in the underlying RC case here. Indeed, Cristal's Statement of Facts, by its own admission, is taken verbatim from its RFR in the underlying RC case. (Cristal Motion at p. 6). There are no newly-discovered relevant facts.

Once the RC case is closed, the unit determination is, and should be, final and not subject to relitigation, ***just as the Rule provides***, absent an adverse court ruling. Unlike NLRB Rule 103.30, which specifically provides for exceptions in "extraordinary circumstances," Rule 102.67(g) does not provide for *any* exception in "special," or "extraordinary," circumstances in ***closed*** RC cases.[5/] If the Board wants to provide an exception to the finality rule to allow for relitigation of an RC unit determination, as Cristal seeks here, it knows how to do so by rule, as it did in Rule 103.30, but it must follow the proper notice and other requirements of the Administrative Procedures Act to amend the Rule. *See*, 29 U.S.C. Section 156. That, it has not done. The Rule is crystal clear: It provides for no "special circumstances."

Cristal asserts that, despite this Rule providing for no exceptions, there are, in fact, two such

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[5/] The Union recognizes that the General Counsel has suggested that, in *open* RC cases, the matter may be re-visited by the Board. Memorandum OM 18-05. The related RC case, however, is not an "open" case, nor does OM 18-05 address that issue.

exceptions: (1) newly-discovered, previously unavailable evidence; and (2) "special circumstances."[6/] Cristal does not allege that the first so-called newly-discovered evidence exception applies. Consequently, the Union need not address this alleged exception.

As to the second alleged exception for "special circumstances," Cristal only cites to ***Duke Univ***., 311 N.L.R.B. 182 (1993); ***Heuer Int'l Trucks,*** 279 NLRB 127 (**1986**); ***Sub-Zero Freezer Co.,*** 271 NLRB 47 (1984). Significantly, all of these decisions pre-date the Board's adoption in 2014 and effectuation in 2015 of Rule 102.67(g). Notably, the Board's final rule differed somewhat from the Rule that it proposed. The differences reinforces the Union's position. The Board in 2014 proposed:

> "(f) *Waiver; denial of request*. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

Representation-Case Procedures, Proposed Rule, 79 FR 7318-01 (Feb. 6, 2014). Unlike the proposed Rule, however, the final Rule in its newly-added first sentence emphasized the finality of the Regional Director's actions; the Board even changed the title of the provision by adding the word, "***Finality***," to emphasize its position, while re-lettering the Subsection from (f) to (g):

"*Finality; waiver; denial of request*. ***The Regional Director's actions are final***

[6/] Contrary to Cristal's assertion that ***Pittsburgh Plate Glass Co. v. NLRB***, 313 U.S. 146, 162 (1941), established that the Board recognizes these two (2) exceptions, this is inaccurate. At best, the portion of that case relied on by Cristal only suggests, at best, the newly-discovered evidence exception: "If the Company or the Crystal City Union desire to relitigate this issue, it was up to them to indicate in some way that the evidence they wished to offer was more than cumulative. Nothing more appearing, a single trial of the issue is enough." *Id*.

> ***unless a request for review is granted.*** Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. ***Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding***."

(bold italics added). The Board could not have made it clearer: it intended that a denial of a request for review was final. If the Board had wanted to codify, or permit, any "special" or "exceptional " circumstances to finality, it easily could have provided for such in its newly-adopted Rule, just as it has allowed for an exception to NLRB Rule 103.30(a):

> "(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in ***extraordinary circumstances*** and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:..."

29 C.F.R. § 103.30 (emphasis added).

Not only did the Board not adopt any exception to Rule 102.67(g), thus rejecting any argument that might be based on ***Duke Univ.***, ***Heuer***, or ***Sub-Zero***, it re-emphasized its position of finality in the revised, final rule. Consequently, whatever relevance those earlier cases may have had previously, they no longer apply.

The Union notes that ***Duke Univ***. merely cites ***Heuer*** for the proposition that RC unit determinations might be re-litigable in CA cases, though Duke apparently never argued for those exceptions and, instead, had waived the issue. ***Duke Univ. v. NLRB***, 1994 WL 665124 (unpublished)(D.C. Cir. 1994). ***Sub-Zero*** dealt with violence that precluded the conduct of a free and fair election, not a unit-scope issue. Further, Member Zimmerman's wise dissent in ***Sub-Zero***

strikes the proper balance between the need for stability in labor issues and factors favoring reconsideration of issues, a balance adopted by the Board in current Rule 102.67(g):

> "The sole reason that relitigation is being permitted here is a change in the composition of the Board from the time the representation case was litigated to the time the test of certification occurred. Certainly the Act allows for shifts in the law when the composition of the Board changes, and undoubtedly Congress intended for the Board to respond to changing times and conditions. It is, therefore, inevitable that a certain degree of instability in Board law will arise as new Members enter into the decision-making process. ***At the same time, however, such changes undermine the goals stated by a long succession of Board Members of maximizing the voluntary settlement of cases and minimizing the litigation of labor disputes. Those goals call for giving due regard for both stability in the law and finality in litigation. Avoiding unnecessary instability and uncertainty is critical to the efficient administration of the Act***."

Sub-Zero Freezer Co., 271 NLRB 47, 48 (1984)(emphsis added). Member Zimmerman went on to emphasize:

> "Early in my tenure at the Board I took the position that factors favoring stability outweighed those favoring reconsideration of the issues in technical refusal-to-bargain cases. In *Bravos Oldsmobile*, 254 NLRB 1056 (1981), I found that selective application of the rule against relitigation of representation issues could cause far greater damage than that which might result if the representation matter was improperly decided. I decided that, in all unfair labor practice cases testing certification, I would not allow relitigation of the representation matters even if I had dissented on the underlying representation case or would have decided the case differently had I participated in it.
>
> A great deal can be gained by applying this form of res judicata to the Board's processes. ***When changes in the Board occur, the parties could at least be certain that decisions already made at the representation level are final. The wisdom of this approach is particularly apparent here where there was a full hearing on the representation issue and a dissenting opinion which apparently sets forth what is now the view of the current Board.*** The reviewing court will have both the record in the hearing and the dissenting opinion before it for full consideration. In these circumstances, the Board would lose very little in applying the rule of res judicata and would contribute greatly to the orderly administration of the Act during a period of change."

Id. (emphasis added). By adopting the current version of Board Rule 102.67(g), the Board

effectively has adopted Member Zimmerman's wisdom and approach of finality, a *res judicata*-type of application to (closed) RC unit determinations. As former Board Member Zimmerman recognized, such an approach is much more consistent with the purposes of the Act, provides for more efficient administration of the Act, does not promote instability in labor relations, but still allows for a full record before any reviewing court, in order to allow for judicial correction in the event that the Board has seriously erred in the underlying RC case.

Indeed, under the circumstances of this case, application of Rule 102.67(g) is particularly appropriate. Not only does the Rule provide for no exceptions, but the effective retroactive application of ***PCC Structurals*** to *closed* RC cases undermines one of the purposes of the Act*, i.e.*, promoting labor-management stability. When deciding whether to apply a new standard retroactively, the Board must either apply its decision retroactively to all cases, or to none. Applying ***PCC Structurals*** retroactively will not serve the purposes of the Act to stabilize labor-management relations, since the ***Specialty Healthcare*** standard has been applied in many cases in the nearly six (6) years since ***Specialty Healthcare*** was decided, with presumably many subsequent labor-management negotiations, contracts, and related Board decisions being based on units determined under that standard.

If eight (8) courts of appeal had put into question the ***Specialty Healthcare*** unit-determination guidelines, an argument to apply ***PCC Structurals*** retroactively might carry a little more weight. However, the ***Specialty Healthcare*** approach has been *approved* by eight (8) circuit courts of appeal. Both union and employer negotiators reasonably relied on that standard for years, when approaching unit-determination issues. To apply ***PCC Structurals*** retroactively in ***closed*** RC cases and, thus, possibly put into question many units decided with ***Specialty Healthcare*** in mind

– whether the units were litigated, or decided through voluntary recognition -- will needlessly promote industrial strife, seriously interfere with labor-management relations, and fail to promote orderly procedures for preventing interference with rights provided for by the Act, all in violation of 29 U.S.C. §141, and/or fail to encourage the practice and procedure of collective-bargaining and/or seriously interfere with the exercise by workers/employees of *their* full freedom of association, *self*-organization, and designation of representatives of *their* own choosing, in violation of not only 29 U.S.C.§151, but also the First Amendment of the U.S. Constitution. The Act and Constitution protect SELF-organization of THOSE employees, who seek to join together for THEIR mutual aid and protection.

While the Union is unclear as to the status of bargaining at the unit involved in ***Specialty Healthcare/Kindred Nursing***, it is likely that, if applied retroactively, the decision in ***PCC Structurals*** could have a significantly-negative impact on labor-management relations at that unit and many other units, that have been established through various means, since the Sixth Circuit upheld ***Specialty Healthcare*** nearly five (5) years ago. Established units in *closed* RC cases should not be disturbed, absent an adverse court ruling. NLRB Rule 102.67(g), properly recognizes this need.

Nevertheless, even if Member Emanuel appropriately participated in ***PCC Structurals*** and even if the Board might need to decide in other cases whether to apply ***PCC Structurals*** retroactively, the Board need not (and should not) decide the retroactivity question, *here,* particularly since the related RC case is now *closed*. NLRB Rule 102.67(g). In *this* case, the Employer failed to clearly or adequately preserve in its Statement of Position, pp. 6-7 and 13, in the underlying RC case (SOP), as argued in the "Union's Response to Cristal USA, Inc.'s Request for Review of

Regional Director's Decision and Direction of Election" in Case 08-RC-184947 at pp. 3-4, that it was seeking a wholesale reversal of ***Specialty Healthcare,*** primarily arguing that, even under ***Specialty Healthcare***, the proposed unit was not appropriate.[7/] Thus, Cristal may not raise its argument now, that ***Specialty Healthcare*** 's analytical framework violated Section 9(c)(5) of the Act. ***Duke Univ***, 1994 WL 665124; ***Cook Inlet Tug & Barge, Inc***., 2014 WL 265834n.1, Case 19-RC-106498 (Order 01/23/2014).

Just as the Board accepts, on remand, an appellate court's unfavorable decision as the "law of the case," while continuing to maintain its position on an issue for future litigation, this Board need not decide in *this* case whether Member Emanuel should have recused himself from ***PCC Structurals***, or even whether that case was wrongly decided, so long as that decision is not applied here to disturb a unit twice effectively upheld by the Board in a now *closed* RC case. To do so will only unnecessarily provoke industrial strife. The Board can leave for another day those issues, while still continuing to recognized the validity of the Certificate of Representative here.

Thus, given (a) that Member Emanuel should have recused himself in ***PCC Structurals*** (and

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[7/] At best, Cristal only challenged the ***Specialty Healthcare*** framework as violating the "in each case" requirement of Section 9(b) of the Act, not Section 9(c)(5); it did not challenge that framework, itself, as violating Section 9(c)(5) of the Act.

At most, Cristal preserved an argument in its SOP that the Union proposed unit would be in violation of Section 9(c)(5), but its Section 9(c)(5) argument was not based on the ***Specialty Healthcare*** framework itself, and such a violation arguably still could occur even under ***PCC Stucturals***. Arguing that the proposed unit would violate Section 9(c)(5) is not the same as arguing that the ***Specialty Healthcare*** framework**,** itself, required such a violation and, therefore, should be overturned.

Nevertheless, since the Board's interpretation of the phrase, "in each case," in Section 9(b) of the Act in ***PCC Structurals*** over-emphasizes and expands on the legislative meaning of that phrase, as interpreted by the Supreme Court in ***American Hospital Association v. NLRB***, 499 U.S. 606 (1991), its reasoning in ***PCC Structurals*** is further suspect.

should recuse himself in this case), (b) that NLRB Rule 102.67(g) provides for no exceptions to that rule on non-re-litigation, (c) that eight courts of appeal have approved the ***Specialty Healthcare*** standard, and, significantly (d) that the Employer failed to clearly or adequately preserve the issue, that it was seeking the whole-sale reversal of ***Specialty Healthcare,*** based on Section 9(c)(5) of the Act, when it filed its SOP in the underlying RC case, *see*, NLRB Rule 102.66(d), the Board need not address and decide the retroactivity issue in *this* case. ***PCC Structurals*** simply should not apply, or be considered, either because Cristal did not adequately preserve the issue of reversing ***Specialty Healthcare*** on Section 9(c)(5) grounds, or because, as a closed RC case, Rule 102.67(g) make the issue moot.

Nevertheless, if the Board applies ***PPC Structurals*** and overturns the RD's unit determinations, the Union is prepared to continued to challenge such an action.[8/]

[8/] ***PCC Structurals***, contrary to the statute and the Constitution, elevates the interest of those employees, who have not chosen to engage in SELF-organization with the Petitioning employees, to a position over, or equal to, the interests of those employees, who have. Placing the included and excluded employees on the same plane is not what Section 7 of the Act provides for, nor the federal Constitution allows. The freedom of association recognized by the Act and in the First Amendment includes the freedom to exclude others from one's group, at least to a certain extent. The question, of course, is how does one balance the interests of both groups.

Excluding employees, who do not seek to be part of the unit, does not violate Section 7 or Section 8(a)(3) of the Act, since such an exclusion does not interfere with the excluded employees' ability to refrain from union activities. Nor would such exclusion inhibit the excluded employees, if they so wish, to later seek to be included within the unit, through an ***Armour-Globe*** election, or to seek a separate unit, through a residual-unit proceeding, etc.

Thus, to the extent that ***PCC Structurals*** may be applicable, it must be reversed as inconsistent with the purposes of the Act and the Constitutional-protection of the freedom of association and First Amendment rights for the petitioning employees and their organization. One of the weaknesses of the Board's analysis in ***PCC Structurals*** is its failure to interpret Sections 9(b) and 9(c)(5) of the Act with constitutional implications in mind, similar to how a Texas court failed to take into account union adherents' First Amendment rights:

Based on the Employer's failure to clearly, adequately, and timely preserve any right to seek whole-sale reversal of ***Specialty Healthcare***, as well as on Rule 102.67(g), the Board should not, and need not, disturb its earlier *closed* RC unit decision. While not necessarily controlling, the

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> "Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.' Thornhill v. Alabama, 310 U.S. 88, 102, 103, 60 S.Ct. 736, 744, 84 L.Ed. 1093; Senn v. Tile Layers Protective Union, 301 U.S. 468, 478, 57 S.Ct. 857, 862, 81 L.Ed. 1229. The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly. Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423. The Texas court, in its disposition of the cause, did not give sufficient weight to this consideration, more particularly by its failure to take account of the blanketing effect of the prohibition's present application upon public discussion and also of the bearing of the clear and present danger test in these circumstances."

Thomas v. Collins, 323 U.S. 516, 532 (1945). The Board in ***PCC Structurals*** failed to take into account the constitutional *associational* rights of the petitioning employees to decide who they wished to have joined with them for bargaining purposes and who they did not. By placing both g roups of employees on the same plane, ***particularly at the employer's request*** – not at the excluded employees' request – the Board in applying ***PCC Structurals*** here risks serious interference with the petitioning employees' First Amendment associational rights. Effectively, despite the Act's protection for "self-organization," ***PCC Structurals*** allows employers and the excluded employees too much say in the matter.

Curiously, despite no "excluded" employees having complained, the Board somehow now believes that the Employer should be able to express the excluded employees' alleged interests with the same fervor as the included employees' own, chosen representative. The Act does not place petitioning and excluded employees on the same plane. That is NOT what the National Labor Relations Act was designed to do! The Board's failure to consider the implication of the petitioning employees' self-organization and constitutional associational right to chose (with some limitation) who they do not want to be part of their unit undermines its analyses and decision in ***PCC Structurals***. On the other hand, the Board's earlier decision in ***Specialty Healthcare*** struck the proper balance between the petitioning employees' interests and the excluded employees' interests, recognizing both groups of employees' interests, but placing the proper balance in favor of those who wish to associate with each other versus those who do not.

petitioning employees' statutory and constitutional associational rights may, and should, be given strong consideration (as one of a number of factors) above the interests of non-petitioning employees, unless the excluded employees have an overwhelming interest in being included. That approach strikes the proper balance between the interest of both groups of employees, allowing both groups to enjoy their respective Section 7 and "associational" rights to participate, or refrain from participating, in organizational activity.

The previously-determined Plant 2 North unit has been determined appropriate in a now-closed RC case. The Employer, in this "test of cert" case, is relying solely on *its* challenge to that unit to defend against its admitted refusal to recognize and bargain with the certified representative, including failing to provide presumptively-relevant information. Significantly, no excluded employees have complained! The unit determination is, and should be, final.

D. Even under ***PCC Structurals***, the Plant 2 North production unit is appropriate.

Even if the Board should choose to re-consider the appropriateness of the unit under ***PCC Structurals***, the Plant 2 North unit still meets that decision's analytical framework. *See*, "Union's Response to Cristal USA, Inc.'s Request for Review of the Regional Director's Decision and Direction fo Election" and its subsequent opposition to Cristal's motion for reconsideration in Case 08-RC-184947.[9/]

Significantly, Cristal, in arguing that the Plant 2 South production employees and the

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[9/] In support of its position, Cristal cites to "evidence" never included with its RFR. *See, e.g.*, Cristal Motion at 12, regarding "Work Location." None of the "evidence" not attached to the RFR, should be considered because of the "self-contained" requirements of NLRB Rule 102.67(e).

However, while NLRB Rule 102.67(f) did not require the Union in opposing Cristal's RFR to attach evidence, it attached significant excerpts of the record and transcript to support its opposition to RFR and in support of the RD's DDE.

warehouse and maintenance employees unit all must be included with the petitioning Plant 2 North production employees, improperly minimizes, or ignores, highly significant factors. For instance, it is undisputed that the warehouse employees have a separate chain of command, including for disciplinary matters, all the way up to the corporate level, from the production and maintenance employees at both the North and South Plants; the production employees, maintenance employees, and warehouse employees, all have separate wage scales from each other; maintenance employees have their own separate shop, maintenance supervisor, and the chain of command for the maintenance department does not merge with production until it reaches the General Manager; maintenance employees have their own separate, preferred certifications, experience, and training requirements; Plant 2 North production, Plant 2 South production, and warehouse employees each have separate vacation, on-call, and overtime policies; and there is no, limited, or only sporadic contact between the various groups of employees. DDE in ***Cristal USA, Inc***., Case 08-RC-184947 at pp. 5 – 7; DDE in ***Cristal USA, Inc***., Case 08-RC-188482 at pp. 10-13; ***Cristal USA, Inc***., 365 NLRB No. 82n 1 (2017); Union Response to DDE, Exhibit C, Select Transcript pages of hearing.

For these significant differences alone, the petitioned-for unit is appropriate under either standard. Little is more important *from the employees' perspective* than who disciplines them, who supervises them day-to-day, who decides when or how they can take vacation, or whether they will be on-call or have to work overtime and under what conditions.

Further, the petitioned-for Plant 2 North production employees work in an entirely different and separate building from the production employees at Plant 2 South; each group of production employees have their own separate parking area with the North and South Plants being about one-half miles from each other, each building being divided by a public road; the Plant 2 North

production employees have their own skills, their own "unique" equipment, and specialized training specific to producing a particular chemical, all different from the Plant 2 South production employees, and produce that chemical as a distinct part of Cristal's production process; contact between the North and South production employees is almost non-existent; the North and South Plant production employees each are separately supervised by their own Manufacturing Superintendent; the North production employees work in four 7-person teams, while the South production employees work in four 13 or 14-person teams. 365 NLRB No. 82n.1; DDE in Case 08-RC-184947 at pp. 1-6, 10-13; DDE in Case 08-RC-188482 at pp. 2, 4-5. This Board already has recognized these distinctions:

> "Although the [North production employees] share some facility-wide terms and conditions of employment with other employees, their actual contact and interchange with other employees is minimal. They do not temporarily interchange with Plant 2 South production employees. Their performance of voluntary warehouse overtime is sporadic and employees outside the petitioned-for unit do not reciprocate by performing Plant 2 North production work.... As for contact between the Plant 2 North and South production employees, it is limited to coordinating activities during periodic downtime or shutdown operations. Contact between the Plant 2 North production employees and the maintenance employees are similarly sporadic, limited to occasional on-site equipment repairs of production machinery, and coordinating to ensure that electricity is cut off to equipment that is being repaired."

365 NLRB No. 82n.1.

The North Plant Manufacturing Supervisor and the South Plant Manufacturing Supervisor separately supervise their respective buildings, though both report to the Plant 2 Operations Manager, Neil Wessman. While Wessman has responsibility over both plants, the evidence strongly suggested that the day-to-day operations at the North and South plants were not something with which he had significant knowledge. Emphasizing the separateness of the building operations, Wessman had little

knowledge about the differing "local" vacation, on-call, and overtime policies distinct to the North compared to the South Plant production employees, or distinct to the warehouse employees. Indeed, such differing "local" distinctions were left up to each separate North and South Plant. (DDE in Case 08-RC-184947 at pp. 10-13)(DDE in Case 08-RC-188482 at pp 9-13); Union Response to RFR, Exhibit C, Transcript at pp. 134-36, 149, 172, 183.

Even Cristal's own, main witness admitted that, while the North Plant production employees produce TiCl4, the South Plant employees do not produce TiCl4, nor do they use, nor are they trained on, the admittedly "very unique" equipment used only by the North Plant production employees, requiring its own, separate, extensive training. (RC transcript in Case 08-RC-184947 at 107, 135-36, 153-54); Union Response to RFR, Exhibit C, Transcript at p. 153-54.

The Union does not dispute that many of the various employees wear the same, or similar uniforms, or even have similar fringe benefits, even the same in some cases as the Steelworkers in Plant 1, who are represented in a separate unit. (Union Response to RFR, Exhibit C, Transcript at p. at 174). But from the petitioning employees' perspective – the appropriate "self-organization" perspective -- the North Plant production employees still have sufficiently distinct interests from the maintenance employees and from the warehouse employees. There was no evidence that production and maintenance employees had any responsibility to do each other's jobs, even temporarily. (While some employees sporadically might do something minor, simply to help out a buddy, there was no responsibility to do so). Maintenance employees have their own separate supervision; they work out of their own separate shop areas and department, where much of their work is performed; they have significantly different experience and training requirements than production employees; and they have their own wage scale. DDE in Case 08-RC-184947 at pp. 4-5; DDE in Case 08-RC-188482

at p. 6. Clearly, the North Plant production employees have sufficiently distinct interests that differ from the maintenance employees to justify their own unit.

Similarly, the production employees interests are significantly different from the warehouse employees. Warehouse employees' jobs require significantly less skills and training than either the production or maintenance employees. They report to the Warehouse Superintendent with the disciplinary chain of command going all the way up, separately, to the corporate level. They have different requirements for taking vacation from the other employees. While production employees may volunteer for overtime, unskilled work in the warehouse, this is simply volunteer work and there was little evidence in the relevant RC case of the extent of the sporadic nature of such volunteering. DDE in Case 08-RC-184947 at pp. 5, 7: DDE in Case 08-RC-18842 at pp. 3-4 (Union Response to RFR, Exhibit C, Transcript at p. at 138-41, 152-53, 172. Clearly, the North Plant production employees have sufficiently distinct interests that differ from the warehouse employees to justify their own unit.

The North production employees also have sufficiently distinct interests from the South production employees to justify their own unit, just as there is an apparently stipulated separate unit at Plant 1 represented by the Steelworkers. The South production employees work in a separate building a half a mile away on the other side of a public road; the North and South production employees each use their own "very unique" different equipment, that requires different extensive training; they work in different kinds of teams with the North production employees working in teams of 7, while the South production employees work in teams of 13-14 employees, producing a different product, with different day-to-day supervision even up to the plant level, as well as different applications of the employer's vacation, on-call, and overtime policies; and they have separate

parking lots. Most significantly, the North and South production employees rarely have contact with each other, and when they do, it is minimal. DDE in Case 08-RC-184947 at pp. 4-7, 9-12; DDE in Case 08-RC-188482 at pp. 4-5, 7, 9-10.

Significantly, the RD, even before applying the "overwhelming community-of-interest" test, applied the Board's "traditional criteria," when finding that the petitioned-for employees share a community-of-interest:

> "Here, not only do the Plant 2 North production employees all work in the same classification, and the same location, and perform the same function, they all work under common supervision. The Plant 2 North Manufacturing Superintendent oversees all production at Plant 2 North. In addition, all of the petitioned-for employees are paid the same wage rate, receive the same benefits, have similar skills and training requirements, and are subject to the same Employer policies. Their work has a shared purpose and is functionally integrated: Specifically, the production employees work together to produce TiCl4. This functional integration is exemplified by the fact that the production employees work together in teams and are trained to become qualified in the major areas of the process. Further, the petitioned-for employees are the only production employees who work at Plant 2 North in the production of TiCl4.
>
> Accordingly, I conclude that the employees in the petitioned-for unit share a community of interest any the petitioned-for unit is appropriate for the purposes of collective bargaining."

DDE in Case 08-RC-184947 at p. 9. This finding should end the matter. Cristal did not adequately preserve any right to challenge the RD's subsequent *use* of the ***Specialty Healthcare*** "overwhelming community-of-interest" analysis as being violative of Section 9(c)(5) of the Act. Nevertheless, Section 9(c)(5) did not require rejection of the petitioned-for unit.

While Section 9(a)(5) of the Act provides that the petitioning employees' organizational activities may not be "controlling" in the unit determination analysis, the Board long has held that the petitioning employees' organizational interest, nevertheless, is an important factor to consider.

With this in mind and in viewing the matter from the proper, petitioning employees' perspective, there should be little doubt that the Plant 2 North production employees warrant their own separate unit, since they share interests with each other within the petitioned-for unit sufficiently distinct from the excluded South Plant production employees with whom they have no, little, or rare contact; who are in a separate building on the other side of a public road a half-mile away with a separate parking lot; who use different and "very unique" equipment requiring separate, extensive training; whose vacation, on-call, and overtime policies are applied differently; who have different Manufacturing Superintendents, who separately manage them day-to-day, with the Manufacturing Superintendents' supervisor, Operations Manager Wessman, having little knowledge of the unique "local" variations between the North and South Plant policies; and who work with different types of teams in which the different groups of production employees work.

It is not relevant whether both groups of production employees might constitute "an" appropriate unit, nor whether Cristal's proposed unit would be "an" appropriate unit. The only relevant question is whether the petitioned-for unit is appropriate. It is under either the ***PCC Structurals***, or the ***Specialty Healthcare***, tests.

III. CONCLUSION

The Board should reject Cristal's efforts to effectively re-open the related, underlying RC case; find that Cristal may not re-litigate the unit-determination issue in this CA case; and find that Cristal had and has a duty to bargain with the certified representative, the Union, which it admittedly has violated. As such, the Board should deny Cristal's motion for summary judgment and grant both the Counsel for General Counsel's and the Union's pending motions for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2018, a copy of the foregoing was electronically filed using the Board's electronic filing system and served via email on:

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